professional solicitors to call people on the national "do-not-call" registry adopted by North Dakota as the state do-not-call list, although these charitable calls would be legal if placed by compensated employees or volunteers.

4. The Office of the Attorney General is required to establish, maintain, and publish a listing of telephone numbers of North Dakota consumers who request not to receive "telephone solicitations." N.D. Cent. Code § 51-28-09. The Attorney General may satisfy this obligation by contracting to establish the state's own list, or by designating the national do-not-call registry maintained by the Federal Trade Commission as the state do-not-call list. N.D. Cent. Code §51-28-09(2). The Attorney General refers citizens seeking to sign up on the state's do-not-call list to the website for the FTC's national do-not-call registry.

5. "Telephone solicitation" is defined by the Act as: any voice communication over a telephone line for the purpose of encouraging charitable contributions, or the purchase or rental of, or investment in, property, goods, services, or merchandise, including as defined in subsection 3 of section 51-15-03, whether the communication is made by a live operator, through the use of an automatic dialing-announcing device, or by other means. Telephone solicitation does not include communications:

> a. To any subscriber with that subscriber's prior express written request, consent, invitation, or permission.
>
> b. By or on behalf of any person with whom the subscriber has an established personal or business relationship.
>
> c. By or on behalf of a charitable organization that is exempt from federal income taxation under section 501 of the Internal Revenue Code, but only if the following applies:
>
> > (1) The telephone call is made by a volunteer or employee of the charitable organization; and

(2) The person who makes the telephone call immediately discloses the following information upon making contact with the consumer;

(a) The persons true first and last name; and

(b) The name, address, and telephone number of the charitable organization.

d. By or on behalf of any person whose exclusive purpose is to poll or solicit the expression of ideas, opinions, or votes, unless the communication is made through an automatic dialing-announcing device in a manner prohibited by section 51-28-02.

e. By the individual soliciting without the intent to complete, and who does not in fact complete, the sales presentation during the call, but who will complete the sales presentation at a later face-to-face meeting between the individual solicitor or person who makes the initial call and the prospective purchase.

f. By or on behalf of a political party, candidate, or other group with a political purpose, as defined in section 16.1-08.1-01. N.D. Cent. Code § 51-28-01(7).

6. "Established business relationship" is defined by the Act as:

> a relationship between a seller and consumer based on a free trial newspaper subscription or on the consumers purchase, rental, or lease of the sellers goods or services or a financial transaction between the consumer and seller, within the twenty-four months immediately preceding the date of a telemarketing call.

Id. at (4).

7. The Act prohibits certain telephone solicitations as follows:

> A caller may not make or cause to be made any telephone solicitation to the telephone line of any subscriber

> in this state who, for at least thirty-one days before the date the call is made, has been on the do-not-call list established and maintained or used by the attorney general under section 51-28-09 or the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 310.

N.D. Cent Code § 51-28-06.

8. The Act may be enforced either by the Attorney General or private persons who receive telephone solicitations allegedly in violation of the Act. N.D. Cent. Code §§ 51-28-11, 13 and 22.

9. The Act provides several means for the Attorney General to enforce its provisions both administratively and judicially.

10. The Act allows the Attorney General to seek relief for alleged violations through the Unlawful Sales and Advertising Practices Act, N.D. Cent. Code § 51-15, as well as the remedies set forth in the Act. N.D. Cent. Code § 51-28-10.

11. The Unlawful Sales and Advertising Practices Act allows the plaintiff to seek injunctive relief from a district court and, in certain circumstances, *ex parte* appointment of a receiver for the assets of alleged violators. N.D. Cent. Code § 51-15-07.

12. The Act allows the Attorney General to issue a cease and desist order "without notice or hearing" and to conduct administrative adjudicative hearings. The Act allows the Attorney General to make findings regarding violations of the Act and assess civil penalties in those administrative hearings. N.D. Cent. Code §§ 51-15-14, 15.

13. The Act can also be enforced by private plaintiffs with no involvement by the Attorney General. Private plaintiffs may bring an action seeking to enjoin violations, or for damages, or for both remedies. The Act provides for actual

damages or $2,000 per violation, whichever is greater. N.D. Cent. Code § 51-28-11. This section does not allocate any special burden of proof on potential plaintiffs.

14. The Act does not require positive proof of identification from any consumer requesting that a number be added or that the consumer requesting a number be added actually be the subscriber to that number. Nor do these procedures require that the number be independently verified as belonging to the person requesting that it be added to the list.

15. The Act does not establish any mechanism to ensure that numbers on the listing are accurate based on citizens moving within the state or out of the state, or a person subscribing for new telephone service and being assigned a number which was previously on the list, nor does it establish means to remove numbers from the list if a person becomes a supporter of a nonprofit organization and wishes to be called in the future to renew that support.

16. The Eighth Circuit reversed the District Court's opinion by judgment entered December 7, 2005. The Charities seek a writ of certiorari from that opinion.

SUMMARY OF ARGUMENT

Petitioners seek review of a decision of the Eighth Circuit Court of Appeals, which conflicts with the decisions of this Court. The Eighth Circuit has ruled that a state may impose do-not-call restrictions on charitable appeals by professional fundraisers while exempting charitable appeals by volunteers and employees. This Court has ruled that charitable appeals delivered by professionals are protected at the core of the First Amendment, and applying restrictions to them "necessarily discriminates" against small, new or unpopular charities that must hire professional fundraiders. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 799 (1988) ("*Riley*").

The Eighth Circuit's decision also conflicts with decisions of the FTC, FCC, and Tenth and Fourth Circuit Courts of Appeals regarding the proper reach of the national do-not-call registry. According to the FTC and Tenth Circuit, the national do-not-call registry promulgated and administered by the FTC does not apply to charitable speech, but only to *core commercial speech*. The FTC has expressly exempted all charitable calls from the do-not-call registry. North Dakota and the Eighth Circuit are attempting to change that. North Dakota has adopted the FTC's national-do-not call registry as a state do-not-call list[1] and, by the provisions of the Act, is unilaterally extending its application to charitable calls made by professional fundraisers.

Thus, North Dakota is now doing what this Court, FTC, FCC, and the Tenth and Fourth Circuit Courts of Appeals suggested cannot be done—subjecting charitable calls to the national do-not-call registry based on whether the charity does or does not hire a professional fundraiser.

The Charities brought a facial challenge under 42 U.S.C. § 1983 in the District Court to the restrictions on charitable calls by professional fundraisers contained in the Act. In *Fraternal Order of Police v. Stenehjem*, 287 F. Supp. 2d 1023, 1031 (D. N.D. 2003) (App. 14a-26a), the District Court properly held the charitable speech restrictions to be facially unconstitutional.

The District Court's decision was reversed by a split panel of the Eighth Circuit Court of Appeals below, reported as *Fraternal Order of Police v. Stenehjem*, 431 F.3d 591 (8th

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[1] See North Dakota State Attorney General's website (www.ag.state.nd.us/nocall/Nocall2.htm), linking individuals seeking to register for North Dakota's state do-not-call restrictions to the website for the national do-not-call registry (www.donotcall.gov). See also N.D. Cent Code § 51-28-06.

Cir. 2005) (App. 1a-13a). The Eighth Circuit's decision subjecting charitable calls to the national do-not-call registry:

> (A)(A) Constitutes a dramatic and dangerous departure from the decisions and pronouncements of the FTC, FCC, and the Tenth and Fourth Circuits regarding the *inapplicability* of the national-do-not call registry to charitable calls (and notably fails to give deference to the pronouncements of the FTC on this point);
>
> (B) Violates the First Amendment principles established by this Court through its application to charitable speech of a lesser standard of review applicable to core commercial calls, and failure to require the government to identify any governmental interest warranting application of do-not-call restrictions to charitable speech;
>
> (C) Violates the First and Fourteenth Amendments by treating some charitable and commercial speech more favorably than the fully-protected speech of the Charities; and
>
> (D) Inexplicably adopts the "FTC's limited jurisdiction" rationale created by the Fourth Circuit in *National Federation of the Blind v. Federal Trade Commission*, 420 F.3d 331 (4th Cir. 2005) (in which the majority held that the application of First Amendment and Equal Protection principles may be defeated through the clever interpretation of agency jurisdictional limitations), despite the fact that the FTC is not a party to this case and the North Dakota Legislature did not rely upon a "limited jurisdiction" argument to justify its discriminatory application of do-not-call restrictions to charities using professional fundraisers.[2]

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[2] A Petition for Writ of Certiorari is pending before this Court (Case No. 05-927), seeking review of the Fourth Circuit's decision in *National Federation of the Blind v. Federal Trade Commission*, 420 F.3d 331 (4th Cir. 2005). In *National Federation of the Blind*, the Fourth Circuit upheld the FTC's regulation of charitable calls by charities employing professional fundraisers.

This Petition should be granted, and the Eighth Circuit's decision should be reversed.

ARGUMENT

A. North Dakota Stands Alone in Attempting to Subject Charitable Calls to Do-Not-Call List Restrictions Applicable to Core Commercial Speech.

Until the Eighth Circuit's decision, charitable calls have been exempt from do-not-call restrictions. The FTC, FCC, and Tenth and Fourth Circuit Courts of Appeals have each considered the application of the national do-not-call restrictions to calls made by or on behalf of charities. Uniformly, they have (1) held that the national do-not-call registry constitutes "content-based" regulation of speech (not "content-neutral"); (2) exempted charitable calls from the national do-not-call registry; and (3) indicated that regulation of charitable calls must be reviewed under the First Amendment applying a *strict scrutiny* standard, not an intermediate scrutiny standard.

North Dakota has attempted to subject charitable calls to blanket do-not-call restrictions, and it is being supported by an erroneous First Amendment analysis by the Eighth Circuit. By subjecting charitable speech to the national do-not-call registry, the Eighth Circuit has violated the First Amendment principles that have exempted charitable calls from the national do-not-call registry, and trammeled on the authority of the FTC and FCC.

The FTC and FCC

The FTC and the FCC promulgated rules creating the national do-not-call registry. *See* 16 C.F.R. § 310.4(b)(1)(iii)(B); and 47 C.F.R. § 64.1200(c)(2). The national do-not-call registry contains the names of individuals who have indicated

that they do not wish to receive unsolicited calls from commercial telemarketers.

Both the FTC and the FCC expressly exempt all charitable telephonic solicitation from their national do-not-call restrictions in deference to the heightened First Amendment protections on charitable speech.

The FTC has exempted all charitable telephonic solicitations (including those by professional fundraisers) from its national do-not-call restrictions, citing to concerns over the more extensive First Amendment rights of charities. *See* 16 C.F.R. § 310.6(a) ("Solicitations to induce charitable contributions via outbound telephone calls are not covered by §310.4(b)(1)(iii)(B) of this Rule [the national do-not-call restrictions].")[3] Deference should be given to the FTC's exemption of charitable calls from the national do-not-call registry. *See Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984); *Mainstream Marketing*, 358 F.3d at 1236 ("courts owe deference to a federal agency's interpretation of a statute it administers").

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[3] *See* Statement of Basis and Purpose, TSR, Final Rule, 68 Fed. Reg. 4580, 4636-4637 (Jan. 29, 2003) ("The Commission approaches with extreme care the issue of tailoring 'do-not-call' requirements narrowly to advance its legitimate interest in privacy protection and yet minimize the impact on the First Amendment rights of charitable organizations and the telemarketers who solicit on their behalf. . . . After careful consideration of the record as a whole and the relevant case law, the Commission has determined that the best approach to achieve narrow tailoring of the 'do-not-call' registry requirements is to exempt from the 'do-not-call' registry requirements solicitations to induce charitable contributions via outbound telephone calls, and instead to bring charitable solicitation telemarketing only within the ambit of the company-specific 'do-not-call' regime contained in the Rule. . . . **This more limited approach does provide some privacy protection in the context of charitable fundraising, and works better to accommodate both the right of privacy and the right of free speech**." (Emphasis added).)

The FCC was directed by Congress to issue rules concerning "the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object." *See* Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA"), 47 U.S.C. §227(c)(1). The TCPA expressly exempts calls by tax-exempt nonprofit organizations from its definition of "telephone solicitation." 47 U.S.C. §227(a)(3). The FCC has extended this exemption to all calls made *on behalf of* nonprofit organizations.[4]

The Tenth Circuit Court of Appeals

In *Mainstream Marketing, Inc. v. Federal Communications Commission*, the Tenth Circuit upheld the constitutionality of the national do-not-call registry and regulations because they "**apply only to commercial speech.**" 358 F.3d 1228, 1236 (10th Cir. 2004).[5] The Tenth Circuit held that the national do-not-call restrictions are "content-based restrictions" because they draw a line between commercial and non-commercial speech on the basis of content, and applied the "more lenient" intermediate scrutiny standard of review *only* because of the exemption of charitable calls. *Id.* at 1236-37. Indeed, in order to uphold the constitutionality of the national do-not-call restrictions, the Tenth Circuit read "charitable

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[4] As explained by the FCC: "In light of the record before us, the Commission believes that there has been no change in circumstances that warrant distinguishing those calls made by a professional telemarketer on behalf of a tax-exempt nonprofit organization from those made by the tax-exempt nonprofit itself." 68 Fed. Reg. 44144, 44160 (July 25, 2003).

[5] *See id.* at 1233 ("As we discuss below in greater detail, four key aspects of the do-not-call registry convince us that it is consistent with First Amendment requirements. **First, the list restricts *only core commercial speech*.** . . ." [emphasis added]); *id.* at 1234 n.6 ("[W]e use the term 'telemarketing' to refer to commercial sales calls made to induce purchases of goods or services (**not charitable** or political fundraising), consistent with Congress' definition in the Telemarketing Act." [emphasis added])

solicitation" out of the definition of "telemarketing." *Id.* at 1234 n.6.

The Fourth Circuit Court of Appeals

In *National Federation of the Blind v. Federal Trade Commission*, the Fourth Circuit confirmed that "[t]elefunders are not, however, subject to the more restrictive national 'do not call list' which forbids calls to people who have put their names on a general nationwide opt-out registry." 420 F.3d 331, 342 (4th Cir. 2005) (emphasis added). The Fourth Circuit upheld the FTC's requirement that charities comply with a charity-specific do-not-call list, *i.e.*, refrain from calling persons who have previously asked not to be called by a specific charity, on the ground that a charity-specific do-not-call list is more "narrowly tailored" than the restrictions associated with the national do-not call registry. *Id.* at 336, 342 ("In light of the [more restrictive national do-not-call registry], we have no trouble finding the charity-specific restriction on speech to be a permissibly narrow means of protecting the home environment.").

Thus, the FTC, FCC, and Tenth and Fourth Circuit Courts of Appeals have all confirmed the exemption of charitable calls from the national do-not-call registry and restrictions. The Eighth Circuit's departure is unwarranted and unconstitutional.

B. The Eighth Circuit's "Lesser Scrutiny" of the Act's Do-Not-Call Restrictions Violates Fundamental First Amendment Principles.

1. The Eighth Circuit Improperly Applied to Charitable Calls the "More Lenient" Intermediate Scrutiny Standard of Review Applicable to Core Commercial Speech.

The FTC, FCC, Tenth Circuit and Fourth Circuit all agree that, while an intermediate standard of review might be appropriate for the application of the national do-not-call

restrictions to core commercial speech, a higher level of review must be applied to charitable speech. *See* 68 Fed. Reg. 4580, 4636-4637 (FTC); 68 Fed. Reg. 44144, 44160 (FCC); *Mainstream Marketing*, 358 F.3d at 1236-37 (Tenth Circuit); *National Federation of the Blind*, 420 F.3d 342 (Fourth Circuit).

This is due to the higher protection generally afforded charitable speech than commercial speech. "[C]ommercial speech" has been defined as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Electric Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557 (1980). Charitable solicitations "have not been dealt with as purely commercial speech." *Riley*, 487 U.S. at 787-88; *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 513 (1981) (noting that the Court has "consistently accorded noncommercial speech a greater degree of protection than commercial speech").

This Court established the First Amendment principles governing regulation of charitable speech in three cases often described as the "Riley trilogy"— *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620 (1980) ("*Schaumburg*"), *Sec'y of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) ("*Munson*") and *Riley*. Under the Riley trilogy, regulation of charitable speech is subject to strict scrutiny. *See, e.g., McConnell v. Fed'l Election Comm'n*, 540 U.S. 93, 140 (2003) (noting that the Court in *Riley* applied "strict scrutiny" to the charitable solicitation regulation at issue). "Charitable speech" is broadly construed to encompass commercial speech aspects of a charitable solicitation. *See Riley*, 487 U.S. at 795-96; *Gordon and Breach Science Publishers v. Am. Inst. of Physics*, 859 F.Supp. 1521, 1541 (S.D.N.Y. 1994). A regulation may not impose a direct and substantial limitation on charitable speech unless it serves a sufficiently strong subordinating interest that the state is entitled to protect and the state has done so by narrowly drawn

regulations designed to serve those interests without interfering with First Amendment freedoms. *Schaumburg*, 444 U.S. at 636-37.

Riley specifically ruled that applying restrictions to the speech of charities delivered through fundraisers, but not to speech made by employees or volunteers of charities, ". . . necessarily discriminates against small or unpopular charities, which must usually rely on professional fundraisers." 487 U.S. at 799.

The District Court below correctly applied strict scrutiny to the charitable restrictions contained in the Act, in recognition of the higher protection afforded charitable speech, and the content-based nature of do-not-call restrictions. *See Fraternal Order of Police*, 287 F. Supp. 2d at 1030 (App. 24a) ("In order for North Dakota's restriction on charitable speech to be upheld, it must withstand strict scrutiny."); *id.* at 1030 (App. 23a) ("North Dakota's law does not leave it to the recipient's sole discretion who may not call them, so it is not content-neutral."); and *id.* (App. 24a) ("North Dakota's law does not apply uniformly to commercial speech, and it also distinguishes between charitable and commercial solicitations, which make North Dakota's law content-based.").

Over a well-reasoned dissent, an Eighth Circuit panel majority disagreed with the District Court on these points and, through a baffling and cursory First Amendment analysis, reversed the District Court and upheld the constitutionality of the Act. The Eighth Circuit's decision cannot stand.

First, after conceding that the application of the do-not-call registry turned on an analysis of the *content* of speech, the Eighth Circuit majority held that the registry was "content neutral" because (a) in its opinion, the Court did not believe that the North Dakota Legislature had "any disagreement with the message that would be conveyed" by professional solicitors, as opposed to volunteers (431 F.3d at 596 [App. 3a]);

and (b) again in its opinion, applying the restrictions to charitable solicitation, but not advocacy, was reasonable "because solicitation may reasonably be viewed as more invasive than advocacy." (*Id.* at 597 [App. 3a].) The value judgments expressed in the Eighth Circuit's analysis and its reference to the content of the subject speech proves the content-based nature of the regulations at issue. *See Ward v. Rock Against Racism*, 491 U.S. 871, 891 (1989) (cited by the Eight Circuit), stating: "Regulation of expressive activity is content neutral if it is justified *without reference* to the content of regulated speech."

The Act's exemption of charities placing calls "in house" also shows the content-based nature of the Act as it requires a immediate forced speech disclosure for the exemption to apply. N.D. Cent. Code § 51-28-01(7)(c), App. 28a. "Mandating speech that a speaker would not otherwise make necessarily alters the content of the speech. We therefore consider the Act as a content-based regulation of speech." *Riley*, 487 U.S. at 795.

Second, the Eighth Circuit applied an "intermediate scrutiny" standard of review to the application of the do-not-call restrictions to charitable speech. In addition to violating the First Amendment principles articulated in the *Riley* trilogy, the application of intermediate scrutiny contravenes relevant pronouncements by the FTC and Tenth Circuit. As discussed above, the Tenth Circuit applied intermediate scrutiny to uphold the national do-not-call registry *only* after determining that charitable solicitation was *exempt* from the registry. *Mainstream Marketing*, 358 F.3d at 1236-37. The FTC has attributed its reluctance to apply the national do-not-call registry to charitable speech to the higher value level of First Amendment protection accorded charitable speech. 68 Fed. Reg. 4580, 4636-37. The Eighth Circuit's application of the "intermediate scrutiny" standard of review was unprecedented and improper.

2. The Majority Below Failed to Require North Dakota To Meet Its Burden of Justifying Regulation of Charitable Speech.

"When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 816-17 (2000) (citing cases).

The District Court below correctly struck the restrictions of the Act as applied to charitable solicitation because North Dakota failed to show that the law "target[s] and eliminate[s] 'no more than the exact source of the evil it seeks to remedy.'" 287 F. Supp. 2d at 1029 (App. 21a). As lamented by the Eighth Circuit's dissenting opinion, "[t]he state has provided no statistics to support its assertion that its restriction on telefunders' charitable solicitations will significantly reduce the number of telephone intrusions into private residences." 431 F.3d at 601 (App. 12a) (dissenting opinion).

In reversing the District Court, the Eighth Circuit majority ignored the dearth of evidence, instead relying on the North Dakota Legislature's "judgment." As explained by the Eighth Circuit, "we are reluctant to second-guess the North Dakota Legislature's judgment that professional solicitors intrude more regularly on residents' privacy than volunteers or employees and that the Act is a necessary means of enabling its citizens to halt these intrusions." 431 F.3d at 598 (App. 5a).

But this Court has never allowed the regulation of fully-protected charitable speech based upon the mere "judgment" of the government. *See Bartnicki v. Vopper*, 532 U.S. 514, 532 n.18 (2001) (noting that even the burden of justifying restrictions on less-protected commercial speech requires more than "'mere speculation or conjecture'") (quoting *Greater New Orleans Broadcasting Assn., Inc. v. United States*, 527 U.S. 173, 188 (1999); *Playboy Entm't*, 529 U.S. at 819 (hold-

ing that the government failed to carry its burden where it offered "anecdotal evidence" but "little hard evidence" and "no proof" justifying its speech regulation); *cf. Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 624-25 (1998) (Scalia, J., concurring) (emphasizing that the First Amendment would even prohibit a government fraud action against a professional fundraiser, but for the substantial record evidence of specific fraudulent misrepresentations). *See also Mainstream Marketing*, 358 F.3d at 1233 (relying on the FTC's evidence of the harassing effects of the commercial speech at issue, and the absence of comparable evidence for charitable solicitations, to uphold the application of the national do-not-call registry to commercial callers only).

This Court has also ruled that the professional status of the speaker does not change the fully-protected nature of that speech. *Riley*, 487 U.S. at 801; *Meyer v. Grant*, 486 U.S. 414, 437 n.7 (1988).

In this case, North Dakota not only failed to present evidence supporting its particular choice of regulation (*i.e.*, subjecting charitable calls by professional fundraisers to do-not-call restrictions applicable to commercial speech), it also failed to present evidence of any problem to be remedied. Indeed, according to the Tenth Circuit and the FTC, the telemarketing problem was solved with the application of the national do-not-call registry to commercial calls. *See Mainstream Marketing*, 358 F.3d at 1233 ("The government also had evidence that the less restrictive company-specific do-not-call list did not solve the problems caused by commercial telemarketing, but had no comparable evidence with respect to charitable and political fundraising.")[6]

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[6] This finding was based upon the FTC's briefing, in which the FTC *conceded* its lack of evidence supporting regulation of charitable calls. *See* FTC's *Mainstream Marketing* Brief, pages 49-50 ("[T]he FTC had substantial evidence that the company-specific approach was insufficient

The Eighth Circuit majority gave short shrift to the mammoth burden facing the North Dakota Legislature to justify its restrictions on charitable calls. In *Schaumburg v. Citizens for Better Environment*, 444 U.S. at 638-39, this Court held that neither the governmental interest in protecting citizens from fraudulent solicitations nor from invasion of the privacy of the home warranted banning charitable solicitations by professional fundraisers. As explained by this Court in *Schaumburg*:

> The Village's legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition on solicitation. . . ." Frauds may be denounced as offenses and punished by law. Trespasses may similarly be forbidden. If it is said that these means are less efficient and convenient than deciding in advance what information may be disseminated from house to house, and who may impart that information, the answer is that considerations of this sort do not empower a municipality to abridge freedom of speech and press."

Id.; see also WRG Enterprises, Inc. v. Crowell, 758 S.W.2d 214 (Tenn. 1988) ("there has been no showing that this appellant has engaged in fraudulent practices. . . . 'Mere speculation does not constitute a compelling state interest.' . . . Prohibition of telephone solicitations is not the least restrictive means available to the State in seeking to prevent its citizens from fraud."); *Optimist Club of North Raleigh, North Carolina v. Riley*, 563 F.Supp. 847 (E.D.N.C. 1982)

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to control unwanted commercial telemarketing, **but had amassed no similar evidence regarding charitable telemarketing**. 68 Fed. Reg. at 4629. Moreover, the rulemaking record supports the conclusion that, in light of 'fundamental differences between commercial solicitations and charitable solicitations,' the company-specific approach is more likely to be successful in the charitable context."); and *id.*, p. 38 ("[T]he government has no evidence that charities will flout the company-specific provision. . . .")

(holding that a statute making it a misdemeanor for a professional solicitor to solicit by telephone for charitable contributions violated the First and Fourteenth Amendments, and that "there are less restrictive means available to the state [to protect its citizens from fraud]."); and *Planned Parenthood League of Massachusetts, Inc. v. Attorney General*, 391 Mass. 709, 713 (Mass. 1984) (holding a ban on telephonic charitable solicitation to be facially unconstitutional under the First Amendment, and not overridden by any the state's interest in residential privacy).

The North Dakota Legislature has prohibited the Charities (and other small charities using professional fundraisers) from making charitable calls to individuals on the national do-not-call list *without a shred of evidence* that (a) charitable calls pose a threat of fraudulent practices or invasion of residential privacy; or (b) application of do-not-call restrictions are necessary to address any such threat.

At the end of the day, North Dakota's prohibition against charitable calls by professional fundraisers rests upon nothing more than its attorney's unsubstantiated *argument* that "a charity using paid professional telemarketers is typically able to dial substantially more residential telephone numbers than if the charity used its own volunteers or employees." 431 F.3d at 598 (App. 5a.) The Act admittedly is exactly the type of economic restriction on charitable fundraising activity held to be facially unconstitutional in *Munson*, 467 U.S. at 968.

3. The Eighth Circuit's Erroneous Fourth Circuit Citation Led It to Uphold an Under-Inclusive Speech Restriction that Discriminates Against Smaller, Less-Popular Charities.

The Eighth Circuit's decision cites to and relies upon the Fourth Circuit's recent split decision in *National Federation of the Blind*, 420 F.3d 342. The decision in *National Federation of the Blind* upheld the FTC's discriminatory application of charitable call restrictions (*not* including a do-not-call

registry) on charities employing professional fundraisers, on the ground that the FTC has jurisdiction over professional fundraisers, but not over charities themselves. According to the Fourth Circuit decision, the government may avoid the constitutional promises of Free Speech and Equal Protection simply by cleverly interpreting or crafting agency jurisdictional restrictions to permit regulation of only one of two similarly situated speakers. A Petition for Writ of Certiorari in *National Federation of the Blind v. FTC* is pending before this Court (Case No. 05-927).

The FTC's "limited jurisdiction" argument sanctioned by the Fourth Circuit in *National Federation of the Blind* was wrong in that case—and has no conceivable application in this case. The FTC is not a party to this case, and the North Dakota Legislature did not raise any jurisdictional limitations to justify its discriminatory treat-ment of charities that use professional fundraisers. Nonetheless, the Eighth Circuit relied upon the FTC's "limited jurisdiction" as justification for the North Dakota Legislature's discriminatory treatment of smaller, less popular charities that must employ professional fundraisers. In so doing, the Eighth Circuit summarily discarded the First Amendment requirement of a neutral justification for North Dakota's speaker-based distinctions in the regulation of protected speech, and the concomitant evidentiary burden of the Government to defend speech restrictions. This Court should grant certiorari to reinstate these black letter standards in the Eighth Circuit.

Government regulation of protected speech ordinarily must be evenhanded and not dependent on the identity or resources of the speaker. *See, e.g., Greater New Orleans Broadcasting Assn.*, 527 U.S. at 190 (hold-ing that the government cannot restrict advertising for private casinos while allowing the advertising for tribal casinos); *Florida Star v. B.J.F.*, 491 U.S. 524, 539 (1989) (holding that a ban on truthful speech to safeguard privacy interests must apply "evenhandedly, to the smalltime disseminator as well as the media giant"); *Police*

Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 96 (1972) ("[W]e have frequently condemned . . . discrimination among different users of the same medium for expression.").

But the Nor.h Dakota regulations at issue below are not evenhanded. They apply differentially among similarly situated speakers (people speaking in support of charities), using the same medium of expression (the telephone) to deliver comparable speech (charitable appeals and education). This Court has long recognized that the selective speech regulation of professional charitable fundraisers "necessarily discriminates against small or unpopular charities," since it is this subcategory of charities that "must usually rely on professional fundraisers." *Riley*, 487 U.S. at 799. Such discrimination in restricting charitable speech based on the identity and resources of the speakers—favoring larger, more self-sufficient charities over smaller, less prominent ones—violates basic First Amendment principles.[7] Supreme Court authority requires the government to justify, substantively and in a speech-neutral way, such suspect distinctions in the regulation of speakers and messages. *See City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993) (striking city's "selective and categorical" ban on newsracks dispensing commercial handbills because city failed to make a

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[7] Equivalently, the North Dakota law thus also violates the Equal Protection clause of the Fourteenth Amendment by discriminating among similarly situated speakers delivering comparable protected charitable speech over the same medium of expression. *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 228 n.3 (1987) ("Appellant's First Amendment claims are obviously intertwined with interests arising under the Equal Protection Clause."); *Carey v. Brown*, 447 U.S. 455, 471 (1980) (Stewart, J., concurring) (noting that the Court's analysis of an anti-picketing statute on Equal Protection grounds actually implicated "the basic meaning of the constitutional protection of free speech"); and *Special Programs, Inc. v. Courter*, 923 F.Supp. 851 (E.D. Va. 1996) (holding that strict scrutiny applied to the equal protection claims made by a professional fundraiser challenging a regulation exempting other charitable speakers).

coherent showing on the record to support its comparative tolerance of newspaper newsracks); *Carey v. Brown*, 447 U.S. at 465 (holding that an anti-picketing statute could not be upheld as a means of protecting residential privacy because its exclusion for labor picketing had no apparent bearing on privacy, since such excluded picketing was not inherently less disruptive of privacy).

The Act further treats some commercial speech (e.g. by persons with an established business relationship) more favorably than the charitable speech of the Charities through their professional fundraisers. This violates this Court's directives in *Metromedia.*, 453 U.S. at 513; *see also Clear Channel Outdoor, Inc. v. City of St. Paul*, No. 02-1060, 2003 U.S. Dist. LEXIS 13751, at *14-15 (D. Minn. Aug. 4, 2003).

The Eighth Circuit silently side-stepped each of the foregoing constitutional concerns and dispensed with any requirement that the government justify its speaker-based, discriminatory speech distinctions in any way. Instead of any analysis to support this departure, the majority below simply cited and "join[ed] in" the Fourth Circuit majority in *National Federation of the Blind*, purporting to find its "analysis persuasive"—without acknowledging that the Fourth Circuit opinion embraced the FTC's "limited jurisdiction" as a proxy for a substantive neutral justification by the government. *Fraternal Order of Police*, 431 F.3d at 598 (App. at 6a). *See National Federation of the Blind*, 420 F.3d at 438 (finding that the FTC's "jurisdictional boundary" served as the "neutral justification" for a milder distinction between professional and volunteer charitable solicitation). Of course, the Fourth Cir-cuit's reliance on "FTC jurisdiction" to displace the government's First Amendment burden of justifying its discrimination among speakers has *logically nothing whatsoever* to do with the laws of North Dakota or any purported justification for them, or for abandoning long-standing First Amendment principles. Nonetheless, the majority below incongruously cites *National Federation of*

the Blind as sole support for the implausibly generic proposition that "the distinction between professional charitable solicitors and in-house charitable solicitors" is "permissible," 431 F.3d at 598—without reference to context, evidence, neutral justification, burden, or proof. This was clear error reflecting a wholesale abandonment of traditional Constitutional standards.

Having passed the point of no return, the majority below compounded the error. To reconcile (in the absence of any substantive government defense) the obvious underinclusiveness of North Dakota's speech regulation exemption for larger charities with in-house outreach resources, the majority below—unfettered by the traditional requirement of neutral justification—recited the proposition that such a distinction survives if it "does not give one side of a debate an advantage over the other," and it reduces the number of charitable solicitations (albeit on a blatantly discriminatory basis). 431 F.3d at 598. But this Court has "expressly rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" *Los Angeles Police Dept. v. United Reporting Pub. Corp.*, 528 U.S. 32, 47, n.3 (1999) (Stevens, J., dissenting) (citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 117 (1991); *Discovery Network*, 507 U.S. at 529. Moreover, even under the rejected standard, the competition among non-profits for shares of a finite pool of donative dollars *is* a form of debate about the relative merits of different charitable causes, so that selectively impeding the ability of some charities to communicate on the merits *does* give "one side of a debate an advantage over the other."

When the majority below summarily absolved North Dakota of its burden to demonstrate a neutral justification for its speaker-based distinctions, it necessarily also rejected this Court's requirement that, "[w]hen the Government restricts speech, the Government bears the burden of proving the

constitutionality of its actions." *Playboy Entertainment*, 529 U.S. at 816-17 (citing cases). As discussed above, but bears repeating, to carry this burden requires evidence. *Id.* at 819; *Bartnicki*, 532 U.S. at 532 n.18; *Madigan*, 538 U.S. at 624-25 (Scalia, J., concurring). *See also Mainstream Marketing*, 358 F.3d at 1233. But the majority below simply and expressly deferred to North Dakota's bald assertion that "professional charitable solicitors intrude more regularly on residents' privacy than volunteers or employees." 431 F.3d at 598.[8] As observed by the dissenting judge, *nothing in the record* provided any basis for such a conclusion. *Id.* at 601 n.4 (Heaney, J., dissenting) (App. 12a).

Contrary to the majority decision below, this Court's cases are clear that discriminatory underinclusiveness in speech regulation predicated on the identity or resources of the speaker violates the First Amendment, absent convincing evidence of a neutral justification for doing so. Tracing to its inapt citation to a Fourth Circuit split decision pertaining to FTC jurisdiction, the Eighth Circuit has abandoned this Court's longstanding requirement that the government meet an evidentiary burden of supporting a neutral justification for bald discrimination in the regulation of protected speech. The Court should grant certiorari to correct these departures.

4. The Eighth Circuit's Erroneous Fourth Circuit Citation Also Led It to Uphold an Over-Inclusive First Amendment Infringement of Charitable Speech.

The Eighth Circuit majority concluded that government may discriminate arbitrarily against smaller charities and telefunders, and further concluded that government may thereby

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[8] Notably, it was immediately following this gesture of uncritical deference to local government that the majority opinion inaptly declared its reliance on *National Federation of the Blind* to support generically the speaker-based discrimination for which the government had offered no specific evidence.

treat commercial and small-charity speakers as a single category of disfavored speech covered by a do-not-call list. This further leap disregarded entirely the longstanding First Amendment distinction between charitable and core commercial speech, by lumping in with North Dakota's ban on commercial sales calls the purely charitable solicitations made on behalf of non-profit charities. This plainly contravenes the law of this Court. *See, e.g., Riley*, 487 U.S. at 796; *Metromedia*, 453 U.S. at 513 (noting that the Court has "consistently accorded noncommercial speech a greater degree of protection than commercial speech" and this could not treat commercial speech more favorably than fully protected speech). It also denies the basis for the FTC's correct observation that regulation of charitable education and fundraising must be tailored more carefully than that of less-protected commercial speech, so as to "minimize the impact on the First Amendment rights of charitable organizations and the telemarketers who solicit on their behalf," and requires the exemption of all charitable solicitation from commercial do-not-call regulations. 68 Fed. Reg. 4580, 4636-37 (Jan. 29, 2003). *See also Mainstream Marketing*, 358 F.3d at 1233, 1236 (upholding national do-not-call list restriction on core commercial speech by noting that all charitable solicitations are clearly exempt from the restriction).

Whatever its treatment of pure commercial speech, the government has no legitimate interest—much less a compelling one—in blocking protected charitable speech from reaching willing recipients. As the dissent noted below, the very act of co-mingling regulation of fully-protected charitable speech with less-protected commercial speech through a single, take-it-or-leave-it do-not-call list forces people who specifically want to avoid commercial telephone calls to sign up for a ban that necessarily comprises purely charitable communications as well. *Fraternal Order of Police*, 431 F.3d at 601 (Heaney, J., dissenting) (App. at 11a). This renders the North Dakota statute overinclusive in addition to underinclu-

sive—sweeping "too broadly" and "penalizing a substantial amount of speech that is constitutionally protected." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992). The problem is even worse for the North Dakota residents who signed up for the FTC's national do-not-call list, thinking (correctly) that charities were exempt; they would not even have understood the nature of the take-it-or-leave-it choice their state government would force.

Indeed, as observed also by the District Court below, under North Dakota's statutory scheme, it is the government—not the speech recipient—that decides which protected communications the do-not-call list bans. 287 F. Supp. 2d at 1030 (App. 23a). "But the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993). Accordingly, this Court recognizes as over-inclusive such local laws that vest choice in government decision makers to determine which speech is banned or impeded. *Forsyth*, 505 U.S. at 129-30.

Such overbreadth is even more troubling when a state (like North Dakota) adopts the national do-not-call registry—which expressly exempts all charitable speech and is represented by the FTC to exempt charitable speech—and then extends its application to charitable speech without notice to registrants.

By lumping fully protected charity speech with less protected commercial speech on a single do-not-call list, North Dakota has departed from and diluted the First Amendment protections surrounding charitable appeals. Indeed, the North Dakota scheme is not tailored to avoid over-inclusiveness with respect to charitable speech at all; this is immediately illustrated by the fact that the comprehensive telemarketing regulations administered by the FTC and FCC specifically avoid mixing charitable solicitors with commercial callers on the same do-not-call list. On the federal level, this was not

even a close call—and even if it were, "the tie goes to free expression." *Playboy Entertainment*, 529 U.S. at 819.

CONCLUSION

Because the decision below conflicts with the rulings of this Court, other appeals courts and the United States Constitution, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 03-3848, No. 04-1619, No. 04-1620

FRATERNAL ORDER OF POLICE, NORTH DAKOTA STATE LODGE; VETERANS OF FOREIGN WARS, DEPARTMENT OF NORTH DAKOTA,
Appellees,

vs.

WAYNE STENEHJEM, in his official capacity as Attorney General of the State of North Dakota,
Appellant.

November 19, 2004, Submitted
December 7, 2005, Filed

Before WOLLMAN and HEANEY, *Circuit Judges*, and HOLMES,[1] *District Judge*.

WOLLMAN, *Circuit Judge*.

I.

This case involves a facial challenge to North Dakota Century Code Chapter 51-28 (the "Act"), which prohibits certain telephone solicitations of North Dakota residents who register with the state's "do-not-call" list. Plaintiffs are non-profit organizations who rely on professional charitable solicitors for their fundraising.

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[1] The Honorable J. Leon Holmes, United States District Judge for the Eastern District of Arkansas, sitting by designation.

The Act exempts telephone solicitations made by charitable organizations if "the telephone call is made by a volunteer or employee of the charitable organization" and the caller makes specified disclosures. N.D. Cent. Code § 51-28-01(7) (2003).[2] The Act thus distinguishes between "in-house" charitable solicitors and professional charitable solicitors. Further, the Act's restrictions apply only to telephone solicitation. See *id.* Under the Act, a charity may hire an outside agency to call registrants to advocate the charity's message, but that agency may not solicit the registrant to donate funds.

The district court invalidated a portion of the Act as a content-based regulation that failed strict scrutiny. The district court also awarded attorney's fees under 42 U.S.C. § 1988. North Dakota appeals from the invalidation of the Act, and the parties cross-appeal the award of attorney's fees. We reverse.

II.

We review *de novo* the district court's grant of judgment on the pleadings as to the unconstitutionality of the Act. *Potthoff v. Morin*, 245 F.3d 710, 715 (8th Cir. 2001). Because professional charitable solicitation is fully protected speech, see *Riley v. Nat'l Fed'n of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988), we begin our analysis by determining whether the North Dakota regulation is content neutral or content based.

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[2] The Act also exempts calls made with a resident's prior written consent; by or on behalf of any person with whom the resident has an established personal or business relationship; by or on behalf of pollsters unless the call is made through an automatic dialing-announcing service; by individuals soliciting without the intent to complete the solicitation on the phone but who will follow up with a face-to-face meeting; and by or on behalf of a political party, candidate, or other group with a political purpose. *Id.*

The principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message the speech conveys. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989). "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." *Id.* Regulation of expressive activity is content neutral if it is justified without reference to the content of the regulated speech. *Id.*

Applying these principles to North Dakota's statute, it is evident that the Act is content neutral. First, North Dakota has not distinguished between professional and in-house charitable solicitors because of any disagreement with the message that would be conveyed, for the message would be identical regardless of who conveyed it. Second, the regulation can be justified without reference to the content of the regulated speech, for North Dakota's interest is in protecting residential privacy.

Although the Act appears to make a subject matter distinction between advocacy and solicitation, a regulation that distinguishes between speech activities likely to produce the consequences that it seeks to prevent and speech activities unlikely to have to those consequences "cannot be struck down for failure to maintain 'content neutrality.'" *Hill v. Colorado*, 530 U.S. 703, 724, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000). As the Tenth Circuit observed in reviewing the commercial solicitation restrictions of the national do-not-call registry, the interest in residential privacy "is not limited to the ringing of the phone; rather, how invasive a phone call may be is also influenced by the manner and substance of the call." *F.T.C. v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 855 (10th Cir. 2003) (per curiam). Because solicitation may reasonably be viewed as more invasive than advocacy, we conclude that the Act is a content-neutral regulation. See

United States v. Kokinda, 497 U.S. 720, 110 S. Ct. 3115, 111 L. Ed. 2d 571 (1990) (plurality of the Court upholding Postal Service regulation distinguishing between solicitation and advocacy); *Nat'l Fed'n of the Blind of Arkansas, Inc. v. Pryor*, 258 F.3d 851, 855 n.3 (8th Cir. 2001). (rejecting the charity's argument that the regulation was content based because it regulated only speech that solicits charitable contribution or commercial sales).

III.

The test appropriate for regulation of professional charitable solicitation is derived from *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 636, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980). Although the Supreme Court has not specified whether the Schaumburg test is an intermediate scrutiny review of a content-neutral regulation, we have interpreted it as such. See *Pryor*, 258 F.3d at 854.

We observed in Pryor that the Schaumburg test is "obviously very similar" to the time, place, and manner test enunciated in *Ward*. *Id.* at 855. We then considered: (a) whether the State had a sufficient or "legitimate" interest; (b) whether the interest identified was "significantly furthered" by a narrowly tailored regulation; and (c) whether the regulation substantially limited charitable solicitations. *Id.* at 855-56.

A.

The first question under Pryor is whether the State has a sufficient or legitimate interest. We have held that residential privacy is a "significant" government interest, particularly when telemarketing calls "are flourishing, and becoming a recurring nuisance by virtue of their quantity." *Van Bergen v. Minnesota*, 59 F.3d 1541, 1555 (8th Cir. 1995). *See also Frisby v. Schultz*, 487 U.S. 474, 484, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988) ("The State's interest in protecting the well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society."). The

rationale underlying the North Dakota regulation falls within this significant interest.

B.

We next consider whether North Dakota's regulation is narrowly tailored. "The requirement of narrow tailoring is satisfied so long as the regulation promotes a substantial interest that would be achieved less effectively absent the regulation and the means chosen does not burden substantially more speech than is necessary to further the [state's] content-neutral interest." *Krantz v. City of Fort Smith*, 160 F.3d 1214, 1219 (8th Cir. 1998) (citations omitted); *Ward*, 491 U.S. at 799. When a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal. *Hill*, 530 U.S. at 726.

North Dakota's goal of ensuring residential privacy would be achieved less effectively if the legislature exempted professional charitable solicitors from the Act. Seeking to balance the interest of callers against the privacy rights of subscribers, the legislature distinguished between in-house and professional charitable solicitors. North Dakota contends that the distinction is based upon the sheer volume of calls because "[a] charity using paid professional telemarketers is typically able to dial substantially more residential telephone numbers than if the charity used its own volunteers and employees." Appellant's Brief at 11. In this facial challenge, we are reluctant to second-guess the North Dakota Legislature's judgment that professional charitable solicitors intrude more regularly on residents' privacy than volunteers or employees and that the Act is a necessary means of enabling its citizens to halt these intrusions. See *Pryor*, 258 F.3d at 856 (giving deference to the state in a facial challenge to the state's telephone solicitation regulations).

The Fourth Circuit recently upheld the Federal Trade Commission's (FTC's) charity-specific do-not-call provision. *Nat'l Fed'n of the Blind v. F.T.C.*, 420 F.3d 331, 341 (4th Cir. 2005). Like the statute at issue here, the FTC regulation applied to professional charitable solicitors and exempted in-house or volunteer solicitors. The court held that the regulations struck an appropriate balance between "the rights of charities and telefunders to communicate with potential donors" and "the right of those donors to enjoy residential peace." *Id.* at 349-50. Accordingly, the court held that the provision was "a permissible governmental response to a legitimate and substantial public concern." *Id.* at 350. We find the Fourth Circuit's analysis persuasive, and we join in it in upholding the distinction between professional charitable solicitors and in-house charitable solicitors.

The appellees argue that this distinction renders the Act underinclusive because a ringing phone disrupts residential privacy whether the caller is a volunteer or a professional. They claim that the exemption of in-house charitable fundraisers demonstrates that the Act is not related to residential privacy. Although exceptions from an otherwise legitimate regulation of speech may undermine the government's reasons for the regulation, *City of Ladue v. Gilleo*, 512 U.S. 43, 52, 114 S. Ct. 2038, 129 L. Ed. 2d 36 (1994), we do not perceive that to be the case here. North Dakota's do-not-call statute does not give one side of a debate an advantage over the other, but rather it reduces the total number of unwelcome telephone calls to private residences. "The validity of the regulation depends on the relation it bears to the overall problem the government seeks to correct, not on the extent to which it furthers the government's interest in an individual case." *Ward*, 491 U.S. at 801. In the case before us, the overall problem is the intrusion on residential privacy caused by unwanted telephone solicitation. We are satisfied that the Act furthers the state's interest in preserving residential privacy.

Additionally, the Act does not burden more speech than is necessary to further the State's interest in residential privacy. The place to which a regulation applies must be taken into account in determining whether a statute is narrowly tailored. *Hill*, 530 U.S. at 728. As the Court pointed out in *Frisby v. Schultz*, "[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." 487 U.S. at 484-85. Accordingly, we find it relevant that the Act applies only to personal residences. Further, a content-neutral and viewpoint-neutral opt-in provision like the one here limits the degree of government interference with *First Amendment* interests. See *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 738, 90 S. Ct. 1484, 25 L. Ed. 2d 736 (1970) (statutory scheme giving sole discretion to private citizen to determine whether material was "erotically arousing or sexually provocative" avoided "possible constitutional questions that might arise from vesting the power to make any discretionary evaluation of the material in a government official"); see also *Mainstream Mktg. Servs., Inc. v. F.T.C.*, 358 F.3d 1228, 1242 (10th Cir. 2004) (finding the national do-not-call registry narrowly tailored because "it restricts only calls that are targeted at unwilling recipients"). Although the opt-in nature of the Act is not dispositive, we find it important that the Act's restriction is triggered only when a resident joins the do-not-call registry. Absent this affirmative private action, there is no restriction on a charity's use of professional charitable solicitors. Because the Act prohibits only calls to unwilling residents in their homes, we hold that the Act is narrowly tailored to serve the government's substantial interest in protecting residential privacy.

Finally, the Act need not be the least restrictive means to satisfy the tailoring requirement. *Hill*, 530 U.S. at 726. Although exempting all charitable solicitations from the Act or requiring a charity-specific do-not-call list would be less restrictive than North Dakota's regulation, we are not con-

vinced that the existence of these options renders the Act unconstitutional. Because this narrowly drawn, content-neutral statute does not entirely foreclose any means of communication, we are satisfied that the Act is sufficiently tailored to pass constitutional muster.

C.

We turn, then, to the final consideration under Pryor, whether North Dakota's regulation substantially limits charitable solicitations. We conclude that it does not. The Act prohibits calls to the homes of residents who have chosen not to receive calls from professional charitable solicitors. The Act does not foreclose all means of charitable solicitation directed at these residents. Employees or volunteers may solicit funds from all North Dakota residents, and professionals may solicit funds from residents who have not registered with the state's do-not-call list. Further, the charities may launch fundraising campaigns through the mail or in person. Although the Act restricts charitable solicitation, it leaves open several alternative channels of communication. Accordingly, we conclude that the Act does not substantially limit charitable solicitation.

IV.

Appellees argue that the Act is overbroad because it "makes no legitimate effort to distinguish telemarketing calls affecting residential privacy and innocuous speech" and it prevents unknown charities from soliciting North Dakota residents who have registered with the state's do-not-call list. Appellees' Brief at 26. "For a statute to fail on overbreadth grounds, 'there must be a realistic danger that the statute itself will significantly compromise recognized *First Amendment* protection of parties not before the Court.'" *Pryor*, 258 F.3d at 856 (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)). The North Dakota statute does not present that danger. When

North Dakota citizens register on the do-not-call list, they choose to exclude telephone solicitation from their homes. The registrants have decided that the Act's banned phone calls intrude on their residential privacy. Further, unknown charities will be treated the same as the appellees. Appellees simply cannot support their claim that the Act impermissibly curtails the *First Amendment* rights of parties not before this court.

Conclusion

In holding that the Act does not run afoul of the *First Amendment*, we echo Judge Wilkinson's observations:

> In reviewing these rules, we have no wish to exaggerate. Not every home is a "peaceable kingdom." And it is not the end of the world when a family receives an abandoned call or a late night call that interrupts its evening. But it is one more small strain that families already stressed by twenty-first century life are forced to endure. Our Constitution does not require that we add to family burdens by forbidding even the most reasonable and minor restrictions on telemarketing practices. . . . Our Constitution does not prevent the democratic process from affording the American family some small respite and sense of surcease.

Nat'l Fed'n of the Blind v. F.T.C., 420 F.3d at 343, 351.

North Dakota's narrowly tailored do-not-call statute significantly furthers the state's interest in residential privacy. The Act does not substantially limit charitable solicitations and is not unconstitutionally overbroad.

The judgment is reversed, and the case is remanded to the district court with direction to dismiss the complaint. Likewise, the order awarding attorney's fees is reversed.

HEANEY, *Circuit Judge*, dissenting.

I agree that the State of North Dakota has a legitimate interest in preserving residential privacy. Because I do not believe that its regulation is narrowly tailored to serve that goal, I respectfully dissent.

A "direct and substantial limitation" on charitable speech "cannot be sustained unless it serves a sufficiently strong, subordinating interest that [the government] is entitled to protect," and is narrowly drawn to serve the interest "without unnecessarily interfering with *First Amendment* freedoms." *Village of Shaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 636-37, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980). *Sec'y of State v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 960-61, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (1984). But see *Nat'l Fed'n of the Blind of Ark., Inc. v. Pryor*, 258 F.3d 851, 854-55 (8th Cir. 2001) (citing the Supreme Court's standard of analysis for restrictions on charitable speech but applying a different, more lenient standard).

Consistent with Supreme Court precedent, the first consideration is whether North Dakota's Act directly and substantially limits charitable solicitation activity. I believe that it does. The law prohibits charities from hiring professional telemarketers to solicit funds for them, and it also provides civil penalties for charities who violate the law. The next inquiry is whether the Act serves a sufficiently strong, subordinating interest that the state is entitled to protect. I agree that protection from the invasion of residential privacy by unwanted solicitations is such an interest. See *Frisby v. Schultz*, 487 U.S. 474, 484, 108 S. Ct. 2495, 101 L. Ed. 2d 420 (1988); *Carey v. Brown*, 447 U.S. 455, 471, 100 S. Ct. 2286, 65 L. Ed. 2d 263 (1980); *Rowan v. U.S. Post Office Dep't.*, 397 U.S. 728, 737, 25 L. Ed. 2d 736, 90 S. Ct. 1484 (1970).

I do not agree, however, that North Dakota's regulation is narrowly drawn to serve the government's interest without unnecessarily interfering with *First Amendment* freedoms. First, the Act is overly restrictive. Telefunders in North Dakota are completely prohibited from soliciting charitable funds from members of the do-not-call list, no matter the time of the day nor the percentage of contributions earmarked for the charity. The state does not have a charity-specific do-not-call list, so North Dakotans who are adverse to commercial solicitation but open to charitable solicitation in their homes do not have the opportunity to hear the telefunders' messages. The regulation prevents potentially willing listeners from engaging in discourse about charitable contributions.

Furthermore, the Act is underinclusive. A law is underinclusive, and therefore not narrowly tailored, when it discriminates against some speakers but not others without a legitimate neutral justification for doing so. *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429-30, 113 S. Ct. 1505, 123 L. Ed. 2d 99 (1993). "Even where, as here, the government has a compelling interest in regulating a particular type of speech, its distinctions between similarly situated actors must reflect a 'reasonable fit' between the restriction and the goal to be achieved by the disparate treatment." *Nat'l Fed'n of the Blind v. FTC*, 420 F.3d 331, 351 (4th Cir. 2005) (Duncan, J., dissenting) (quoting *Discovery Network*, 507 U.S. at 417);[3] *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 789-92, 101 L. Ed. 2d 669 (1988). Telefunders' and charities' in-house solicitors' mess-

[3] The majority's holding is based in part on the Fourth Circuit's analysis in National Federation of the Blind. The Telemarketing Sales Rule, the regulation at issue in that case, was found to be a constitutional restriction on charitable speech. Notably, the TSR permits telefunders to call members of the national do-not-call list between the hours of 8:00 a.m. and 9:00 p.m., but not members of charity-specific do-not-call lists. The TRS is less restrictive than North Dakota's Act and is inapposite to the analysis before us.

ages are the same, and both types of speakers intrude into the privacy of the home. It remains unclear, then, why the government has restricted the charitable speech of an unknown percentage of callers that invade residential privacy when so many other groups may intrude upon that privacy, thus diminishing the credibility of the government's rationale for restricting telefunders' speech.

The state has provided no statistics to support its assertion that its restriction on telefunders' charitable solicitations will significantly reduce the number of telephone intrusions into private residences. While I might agree as a matter of common sense that prohibiting calls made by telefunders will limit the number of intrusions, the state has failed to support that contention in the record.[4] See *Nat'l Fed'n of the Blind*, 420 F.3d at 353 (Duncan, J., dissenting) ("The FTC again presents *no evidence* that telefunders are more likely to be violators of consumer privacy or engage in abusive telemarketing practices than in-house solicitors. There is *no suggestion* in the record that consumers are more likely to feel that their privacy is invaded when receiving a call from a telefunder than a volunteer or in-house employee of a charitable organization."); *Discovery Network*, 507 U.S. at 426 (holding that a selective ban on commercial newsracks was not justifiable merely because it would "in some small way limit the total number of newsracks").

North Dakota has failed to demonstrate that its ban on telefunders' calls will restore, or even significantly improve, residential privacy. Therefore, I would affirm the district

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[4] Several states submitted amicus briefs to buttress North Dakota's claim, but statistics from other states are not relevant to our assessment of the North Dakota regulation. Also, the majority supports its holding that the Act is narrowly drawn by relying on the North Dakota Legislature's conclusion that telefunders invade residential privacy more regularly than charitable volunteers or employees. Yet nothing in the record provides a basis for the Legislature's conclusion.

court and hold that North Dakota's direct and substantial limitation on charitable speech cannot be sustained because, although it serves a sufficiently strong, subordinating interest that the state is entitled to protect, it is not narrowly drawn to serve the interest.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NORTH DAKOTA,
SOUTHEASTERN DIVISION

Civil File No. A3-03-74

FRATERNAL ORDER OF POLICE, NORTH DAKOTA STATE LODGE AND VETERANS OF FOREIGN WARS-DEPARTMENT OF NORTH DAKOTA,
Plaintiffs,

vs

WAYNE STENEHJEM, in his official capacity as Attorney General of the State of North Dakota,
Defendant.

October 17, 2003, Decided

Judges: RALPH R. ERICKSON, *District Judge*, United States District Court.

MEMORANDUM OPINION AND ORDER

Before the Court is a motion by Plaintiffs for a preliminary injunction (doc. # 5), a motion by Defendant to dismiss the case (doc. # 12), and a motion by Plaintiffs for judgment as a matter of law (doc. # 18). Both parties have filed briefs on these motions, and the Court heard oral arguments on October 10, 2003.

FACTS

During the 2003 Legislative Session, the North Dakota Legislature passed SB 2255, codified at Chapter 51-28, which

prohibits those defined as "telephone solicitors" from calling North Dakota residents who register for a "do-not-call" list. There are several categories of calls that are not considered telephone solicitors. Included in this list is a telephone call made by a volunteer or employee of a charitable organization. The law also requires these volunteers or employees to give their first and last name and the name, address, and telephone number of their charitable organization when they call potential donors.

On July 30, 2003, Plaintiffs filed this lawsuit challenging the constitutionality of Chapter 51-28. Plaintiffs describe the lawsuit as a "facial challenge" to the statute, Compl. at P 1, and part of the relief they request is that the legislation be declared unconstitutional on its face, Compl. at 16.

Plaintiff Fraternal Order of Police, North Dakota State Lodge, is a nonprofit corporation with tax-exempt status under I.R.C. § 501(c)(8). Compl. at P 6. Plaintiff Veterans of Foreign Wars-Department of North Dakota is also a nonprofit corporation with tax-exempt status under I.R.C. § 501(c)(8). Compl. at P 8. Plaintiffs use people other than volunteers or employees of their organizations to solicit funds for them. Therefore, they are defined as telephone solicitors, and the new law prevents them from calling people on the do-not-call list.

ANALYSIS

Rule 56(c) of the Federal Rules of Civil Procedure provides that a court may award summary judgment to a party if there exists no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. *DICO, Inc. v. Chemical Co.*, 340 F.3d 525, 529 (8th Cir. 2003). A court views the evidence and the inferences that may be reasonably drawn from the evidence in the light most favorable to the non-moving party. *Medtronic, Inc. v. U.S. Xpress, Inc.*, 341 F.3d 798, 800 (8th Cir. 2003). The moving

party bears the burden of demonstrating that there are no genuine issues of material fact. *Id.* If the moving party meets this burden, then the non-moving party must demonstrate the existence of specific facts in the record that create a genuine issue for trial. *Id.* Both parties agree that since this case involves the constitutionality of a statute, it may be decided as a matter of law.

I. Commercial Speech Provisions

As a preliminary matter, the Court must address a standing issue. Plaintiffs' Complaint states that it is challenging the entire law as unconstitutional. Compl. at 16. [] "Ordinarily, a party may not facially challenge a law on the ground that it would be unconstitutional if applied to someone else." *SOB, Inc. v. County of Benton*, 317 F.3d 856, 864 (8th Cir. 2003) (citing *New York v. Ferber*, 458 U.S. 747, 767, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (1982)). An exception to this rule is the overbreadth doctrine in *First Amendment* cases. *Id.* However, the overbreadth doctrine does not apply to commercial speech cases. *Bd. of Trs. of the State Univ. of New York v. Fox*, 492 U.S. 469, 481, 106 L. Ed. 2d 388, 109 S. Ct. 3028 (1989).

Plaintiffs in this case are both charitable organizations; neither is a commercial entity. Therefore, they may not rely on the overbreadth doctrine to challenge the portions of this North Dakota law that regulate commercial speech. *Id.* Even if Plaintiffs had standing, the commercial speech regulations are constitutional.

The Constitution "accords a lesser protection to commercial speech than to other constitutionally guaranteed expression." *Central Hudson Gas v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563, 65 L. Ed. 2d 341, 100 S. Ct. 2343 (1980). When a law regulates non-misleading commercial speech that concerns a lawful activity, the government may regulate that speech as long as it serves a substantial governmental interest, the regulation directly advances that govern-

mental interest, and the regulation is not more extensive than is necessary to serve that interest. *Central Hudson*, 447 U.S. at 566.

In *Fed. Trade Comm'n v. Mainstream Mktg. Servs., Inc.*, 345 F.3d 850, 2003 U.S. App. LEXIS 20366, No. 03-1429, 2003 WL 22293798 (10th Cir. Oct. 7, 2003), the Tenth Circuit applied the Central Hudson test to the Federal Trade Commission (FTC) do-not-call list. In the context of a stay request, the court found that the FTC would likely succeed on the merits because its do-not-call list regulating commercial speech was constitutional. *Mainstream Mktg.*, 2003 U.S. App. LEXIS 20366, 2003 WL 22293798, at *8.

Similar to the FTC do-not-call list, North Dakota's law forbids commercial telephone solicitors from calling people who have placed their phone number on the do-not-call list. Defendant asserts that the interest it is seeking to protect is privacy. The legislative history also states that the government was concerned with telemarketing fraud. A state's interest in protecting the "well-being, tranquility, and privacy of the home" is a sufficiently strong, subordinating interest that the government is entitled to protect. *Frisby v. Schultz*, 487 U.S. 474, 484, 101 L. Ed. 2d 420, 108 S. Ct. 2495 (1988); see also *Rowan v. United States Post Office Dep't*, 397 U.S. 728, 737, 25 L. Ed. 2d 736, 90 S. Ct. 1484 (1970). A state's interest in protecting the public from fraud is also a substantial interest. *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 636, 63 L. Ed. 2d 73, 100 S. Ct. 826 (1980). The government's asserted interests are substantial. *Mainstream Mktg.*, 2003 U.S. App. LEXIS 20366, 2003 WL 22293798, at *3.

The second and third parts of the Central Hudson test require that there be a "fit between the legislature's ends and the means chosen to accomplish those ends." 2003 U.S. App. LEXIS 20366, [WL] at *2 (quoting *United States v. Edge Broad. Co.*, 509 U.S. 418, 427-28, 125 L. Ed. 2d 345, 113 S.

Ct. 2696 (1993)). When establishing this reasonable fit, the government must "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." *Id.* (quoting *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486-87, 131 L. Ed. 2d 532, 115 S. Ct. 1585 (1995)). To demonstrate that this harm is real, the government may use anecdotes, history, consensus, and simple common sense. *Id.* (citing *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628, 132 L. Ed. 2d 541, 115 S. Ct. 2371 (1995)).

Simple common sense indicates that the ringing of the telephone is an intrusion into the tranquility of the home. However, it is not merely the ringing of the phone that is an invasion of privacy; it is also the manner and substance of the call that may be an invasion of privacy. 2003 U.S. App. LEXIS 20366, [WL] at *3. Simple common sense dictates that an unwanted call from a telemarketer would be an invasion of privacy.

The North Dakota Legislature found that many elderly victims in North Dakota have lost $ 10,000 to $ 100,000 or more to telemarketing fraud. It is estimated that up to ten percent of the telemarketing firms operating in the United States in 1996 were fraudulent. Nationwide it is estimated that consumers lose an estimated $ 40 billion each year to telemarketing fraud. *Mainstream Mktg.*, 2003 U.S. App. LEXIS 20366, 2003 WL 22293798, at *6. Based on the ease of proving a violation of do-not-call lists, the legislature found that do-not-call lists deter fraudulent telemarketers.

When determining a reasonable fit, whether a law has an element of private choice in it weighs in favor of a reasonable fit. 2003 U.S. App. LEXIS 20366, [WL] at *8. If the commercial regulation affects more than a minute portion of the asserted harms, this also weighs in favor of a reasonable fit. *Id.* In this case, there is an element of private choice because the individual householder decides whether to place his or her phone number on the do-not-call list. N.D. Cent. Code § 51-

28-09(1)(a) (2003). Nationwide, complaint statistics are much higher for commercial telemarketing calls than for political or charitable calls. *Mainstream Mktg.*, 2003 U.S. App. LEXIS 20366, 2003 WL 22293798, at *6. The great majority of all telemarketing calls are commercial. 2003 U.S. App. LEXIS 20366, [WL] at * 8.

If an individual elects to sign up for the do-not-call list, the law does not completely ban all commercial speech. For example, it allows your dentist to call you and remind you that it is time for semi-annual teeth cleaning. See N.D. Cent. Code § 51-28-01(7)(b) (stating that a person may call someone on the do-not-call list if they have an established business relationship). Also, a salesperson may call as long as the sale will only be completed at a later-face-to-face meeting between the individual solicitor and the person who made the initial call. N.D. Cent. Code § 51-28-01(7)(e). These exemptions reasonably fit the asserted purposes for the law. One who has an established business relationship with you is less likely to engage in fraud, and the recipient of the call is not likely to view such a call as an invasion of privacy. Requiring a face-to-face meeting to complete the sale also reduces the chance for telemarketing fraud by creating more time for a purchaser to contemplate the anticipated transaction. While there are some exceptions for commercial speech in this law, the government is not required to ban all commercial speech in order for there to be a reasonable fit. See *Edge Broad.*, 509 U.S. at 434 (stating that in the commercial speech context, the *First Amendment* does not require the government to "make progress on every front before it can make progress on any front."). Even with these limited exceptions, this law still restricts the great majority of the commercial telemarketing calls. *Mainstream Mktg.*, 2003 U.S. App. LEXIS 20366, 2003 WL 2223798, at *8.

Since there is an element of private choice in this law, this weighs in favor of a reasonable fit. Also, the great majority of

the asserted harms are addressed by this law, which weighs in favor of a reasonable fit.

Plaintiffs lack standing to challenge the commercial portions of this law because the overbreadth doctrine does not apply to commercial speech. Even assuming that Plaintiffs had standing, there is a reasonable fit between the law and the substantial harms that it addresses. Therefore, the provision regulating commercial speech are constitutional.

II. Charitable Speech Provisions

Unlike commercial speech, "charity fund-raising involves speech that is fully protected by the *First Amendment*." *Nat'l Fed'n of the Blind of Arkansas, Inc. v. Pryor*, 258 F.3d 851, 854 (8th Cir. 2001) (citing *Riley v. Nat'l Fed'n of the Blind of North Carolina*, 487 U.S. 781, 787-88, 101 L. Ed. 2d 669, 108 S. Ct. 2667 (1988) and *Schaumburg*, 444 U.S. at 633). When analyzing a law that regulates speech, a court must first determine whether the law is content-based or content-neutral. *Cafe Erotica/We Dare to Bare v. Fla. DOT*, 830 So.2d 181, 183 (Fla. Ct. App. 2002). If one must necessarily look at the content of the speech to determine whether the law applies, then the law is content-based. *Arkansas Writers' Project Inc. v. Ragland*, 481 U.S. 221, 230, 95 L. Ed. 2d 209, 107 S. Ct. 1722 (1987) (stating that since the government official had to look at the type of publication to determine whether the tax applied, the law was content-based). In this case, the law requires charities to use volunteers or employees to make their phone calls. Since one must determine what kind of speech is involved to determine whether this law applies, it is content-based. *Id.* A content-based restriction on speech is presumptively invalid. *Interactive Digital Software Ass'n v. St. Louis County*, 329 F.3d 954, 958 (8th Cir. 2003).

In the cases of *Sec'y of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (1984) and Schaumburg, the Supreme Court laid out a three-part test for analyzing statutes that affect the solicitation of

funds for charities. *Heritage Publ'g Co. v. Fishman*, 634 F. Supp. 1489, 1498 (D. Minn.1986). First a court must detemine whether the statute constitutes a direct and substantial limitation upon free speech. *Munson*, 467 U.S. at 960; *Schaumburg*, 444 U.S. at 635-36. If the statute does constitute a direct and substantial limitation upon free speech, then it may only be upheld if 1) it serves a sufficiently strong, subordinating interest that the government is entitled to protect and 2) it is narrowly drawn to serve that interest without unnecessarily interfering with *First Amendment* freedoms. *Munson*, 467 U.S. at 960-61.

If the law restricts the manner in which a charity may engage in solicitation activity, it is a direct and substantial limitation upon free speech. *Id. at 961*. This law prevents charities from hiring professional telemarketers to solicit funds for them. N.D. Cent. Code § 51-28-01(7)(c). It also provides civil penalties for charities who violate the law. N.D. Cent. Code § 51-28-15. Since it restricts the manner in which a charity may engage in solicitation activity, this law imposes a direct and substantial limitation. *Id.*

Defendant asserts that the interest it is seeking to protect is privacy. A state's interest in protecting the "well-being, tranquility, and privacy of the home" is a compelling interest. *Frisby*, 487 U.S. at 484; see also *Rowan*, 397 U.S. at 737. The legislative history also reveals that the legislature was concerned with fraud. Protecting consumers from fraud is also a compelling interest. *Schaumberg*, 444 U.S. at 636.

In order to satisfy the narrowly-tailored requirement, the law must target and eliminate "no more than the exact source of the evil it seeks to remedy." *Thorburn v. Austin*, 231 F.3d 1114, 1120 (8th Cir. 2000). The statute does not have to be the least restrictive means of regulation, but it must further the asserted compelling interests in a manner that would be achieved less effectively without the regulation. *Id.* The narrowly-tailored requirement for charitable speech is a more

demanding standard than the reasonable-fit requirement for commercial speech.

This law is not narrowly tailored as applied to the interest in preventing fraud. *Schaumberg*, 444 U.S. at 637. Instead of a direct prohibition on solicitation by charitable telemarketers, the state's criminal laws on fraudulent misrepresentations directly address this interest. *Id.* Not every professional telemarketer hired by a charity will engage in fraudulent activity, so this law targets and eliminates more "than the exact source of the evil it seeks to remedy." *Thorburn*, 231 F.3d at 1120. Since the state's asserted interest in preventing fraud prohibits more speech than the evil that it is targeting, and there is another effective means for addressing this interest, the law is not narrowly tailored. *Id.*

The government's other asserted interest is to protect the privacy of the home. If a householder registers his or her phone number with the do-not-call list, it only prevents certain types of charitable calls from invading the privacy of the home. Those charities that use volunteers or employees may still call and invade one's privacy. Since the law still allows invasions of privacy by charities, it is not narrowly drawn to serve the interest in protecting privacy. See *Munson*, 467 U.S. at 960-61 (stating that the statute must be narrowly drawn to serve the asserted interest).

In the legislative history, there are several references to the small portion of money that is retained by some charities who hire telemarketers for solicitation. For example, there was testimony that only 17% of the funds raised go to the Fraternal Order of Police when it hires telemarketers. If that is a concern of the legislature, then it should consider informing the public of the ways in which their contributions will be spent. *Schaumburg*, 444 U.S. at 637-38. Requiring disclosure of the finances of a charity would "help make contribution decisions more informed while leaving to individual choice the decision whether to contribute to organizations that spend

large amounts on salaries and administrative expenses." *Id.* A disclosure regulation which informed the public would address the legislature's concern without running afoul of free speech concerns. *Id.*

Defendant relies heavily on Rowan in its argument that this law, as applied to charitable speech, is constitutional. In Rowan, the law at issue allowed people to inform the Postmaster General of objectionable mailings, and then the Postmaster General would order that mailer to refrain from sending further mail to the named addressee. 397 U.S. at 730. The key distinction between the law in *Rowan* and North Dakota's law is that the United States Supreme Court found the mail solicitation law in Rowan to be content-neutral. See 397 U.S. at 737.

Defendant argues that the law in Rowan could not be content-neutral because it only applied to erotically arousing or sexually provocative mail. See *id.* at 730. This ignores crucial language in the statute that leaves it within the addressee's "sole discretion" to determine whether the advertisement is "erotically arousing or sexually provocative." *Id.* The Court found that this allowed an addressee to prevent even the mailing of a "dry goods catalog." *Id.* at 737.

The law in this case leaves only one thing to the sole discretion of the recipient: the choice to place his or her phone number on the do-not-call list. After making that choice, then it is the government's discretion that decides what kinds of calls are not permitted. In the case of charities, the government—not the recipient—has decided that only charities that use volunteers or employees to place the phone calls may call those on the do-not-call list. Unlike *Rowan*, North Dakota's law does not leave it to the recipient's sole discretion who may not call them, so it is not content-neutral. Another example of a content-neutral regulation can be found in the Pryor case from the Eighth Circuit. See generally 258 F.3d 851. In Pryor, the court analyzed an Arkansas statute that required a

caller to hang up if the recipient informed the caller that he did not want to hear about the charity, goods, or services. *Id.* at 854 (quoting Ark. Code Ann. § 4-99-201(a)(2) (2000)). While this law exempted political speech; since it only applied to charities, goods, and services; the Eighth Circuit held that it was content-neutral because it made no distinction between charitable and commercial solicitors based on the content of their solicitations. *Id.* at 855 n.3. Unlike Arkansas' law, North Dakota's law does not apply uniformly to commercial speech, and it also distinguishes between charitable and commercial solicitors, which makes North Dakota's law content-based.

In order for North Dakota's restriction on charitable speech to be upheld, it must withstand strict scrutiny. Since the law is not narrowly tailored to protect privacy or to protect against consumer fraud, it is an unconstitutional regulation of speech.

III. Severability

The last issue for the Court is how to strike the unconstitutional limitation on charitable speech from the rest of the statute. "The severability of the valid portions of a state statute which is otherwise found constitutionally infirm is a matter of state law." *Kinley Corp. v. Iowa Utils. Bd.*, 999 F.2d 354, 359 (8th Cir. 1993) (citations omitted). Section 1-02-20 of the North Dakota Century Code states:

> In the event that any clause, sentence, paragraph, chapter, or other part of any title, is adjudged by any court of competent or final jurisdiction to be invalid, such judgment does not affect, impair, nor invalidate any other clause, sentence, paragraph, chapter, section, or part of such title, but is confined in its operation to the clause, sentence, paragraph, section, or part thereof directly involved in the controversy in which such judgment has been rendered.

In this case, the only provision of the law that has been rendered invalid is the restriction on charitable speech. This

invalid provision is only contained in the language starting with the word "but" in 7(c) of section 51-28-01 of the North Dakota Century Code and ending with the word "organization" in 7(c)(2)(b). Finding these clauses invalid does not require invalidating the remainder of the clause in 7(c) of section 51-28-01 of the North Dakota Century Code. N.D. Cent. Code § 1-02-20.

Now the clause simply reads that calls by or on behalf of a charitable organization are not defined as telephone solicitation. N.D. Cent. Code § 51-28-01(7)(c). The Tenth Circuit has found that the FTC would likely succeed in its argument that drawing a distinction between charitable and commercial speech is constitutional. *Mainstream Mktg.*, 2003 U.S. App. LEXIS 20366, 2003 WL 22293798, at *8. [] Therefore, providing an exemption for charitable speech in North Dakota's law does not render it unconstitutional. *Id.*

At oral argument, Defendant urged this Court to strike the entire text of 7(c) if the charitable speech provisions were found to be unconstitutional. The Court is of the opinion that if the entire text of 7(c) is excised from the law, then the entire statute would likely become unconstitutional. If 7(c) was entirely deleted from the law, it would then allow certain commercial speakers to call those people who have signed up for the do-not-call list, see N.D. Cent. Code § 51-28-01(7)(b) & (e), and it would entirely prohibit charitable solicitors from calling people on the do-not-call list. The solution Defendant urges would prefer commercial speech, which is entitled to lesser protection, over charitable speech, which is entitled to the full protection of the *First Amendment*. A law which prefers commercial speech over charitable speech is surely not constitutional. By only excising the barest portions of the law which are unconstitutional, the Court has preserved the bulk of the statute.

DECISION

The restrictions placed on charitable speech in Chapter 51-28 of the North Dakota Century Code are unconstitutional. Those provisions, as detailed above, are excised from the law leaving the remainder of Chapter 51-28 intact. Defendant's Motion to Dismiss is DENIED as to Plaintiffs' challenge to the restrictions placed on charitable speech and GRANTED as to the remainder of the Complaint. Plaintiffs' Motion for Judgment on the Pleadings is GRANTED to the extent its arguments apply to the restrictions on charitable speech. Plaintiffs' Motion for a Preliminary Injunction is MOOT.

IT IS SO ORDERED.

Dated this 17th day of October, 2003.

Ralph R. Erickson, *District Judge*
United States District Court

APPENDIX C

NORTH DAKOTA CENTURY CODE

TITLE 51—Sales and Exchanges

CHAPTER 51-28—Telephone Solicitations

51-28-01. Definitions.

In this chapter, unless the context or subject matter otherwise requires, the terms shall have the meanings as follows:

1. "Automatic dialing-announcing device" means a device that selects and dials telephone numbers and that, working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called.

2. "Caller" means a person, corporation, firm, partnership, association, or legal or commercial entity that attempts to contact, or that contacts, a subscriber in this state by using a telephone or a telephone line.

3. "Caller identification service" means a telephone service that permits telephone subscribers to see the telephone number of incoming telephone calls.

4. "Established business relationship" means a relationship between a seller and consumer based on a free trial newspaper subscription or on the consumer's purchase, rental, or lease of the seller's goods or services or a financial transaction between the consumer and seller, within the twenty-four months immediately preceding the date of a telemarketing call.

5. "Message" means any telephone call, regardless of its content.

6. "Subscriber" means a person who has subscribed to residential telephone services from a telephone company or

the other persons living or residing with the subscribing person, or a person who has subscribed to wireless or mobile telephone services.

7. "Telephone solicitation" means any voice communication over a telephone line for the purpose of encouraging charitable contributions, or the purchase or rental of, or investment in, property, goods, services, or merchandise, including as defined in subsection 3 of section 51-15-03, whether the communication is made by a live operator, through the use of an automatic dialing-announcing device, or by other means. Telephone solicitation does not include communications:

a. To any subscriber with that subscriber's prior express written request, consent, invitation, or permission.

b. By or on behalf of any person with whom the subscriber has an established personal or business relationship.

c. By or on behalf of a charitable organization that is exempt from federal income taxation under *section 501 of the Internal Revenue Code*, but only if the following applies:

(1) The telephone call is made by a volunteer or employee of the charitable organization; and

(2) The person who makes the telephone call immediately discloses the following information upon making contact with the consumer:

(a) The person's true first and last name; and

(b) The name, address, and telephone number of the charitable organization.

d. By or on behalf of any person whose exclusive purpose is to poll or solicit the expression of ideas, opinions, or votes, unless the communication is made through an automatic dialing-announcing device in a manner prohibited by section 51-28-02.

e. By the individual soliciting without the intent to complete, and who does not in fact complete, the sales presentation during the call, but who will complete the sales presentation at a later face-to-face meeting between the individual solicitor or person who makes the initial call and the prospective purchaser.

f. By or on behalf of a political party, candidate, or other group with a political purpose, as defined in section 16.1-08.1-01.

51-28-02. Use of prerecorded or synthesized voice messages.

A caller may not use or connect to a telephone line an automatic dialing-announcing device unless the subscriber has knowingly requested, consented to, permitted, or authorized receipt of the message or the message is immediately preceded by a live operator who obtains the subscriber's consent before the message is delivered. This section and section 51-28-05 do not apply to a message from a public safety agency notifying a person of an emergency; a message from a school district to a student, a parent, or an employee; a message to a subscriber with whom the caller has a current business relationship; or a message advising an employee of a work schedule.

51-28-03. Message requirements.

When the message is immediately preceded by a live operator, the operator must disclose at the outset of the message:

1. The name of the business, firm, organization, association, partnership, or entity for which the message is being made;

2. The purpose of the message;

3. The identity or kinds of goods or services the message is promoting; and

4. If applicable, the fact that the message intends to solicit payment or commitment of funds.

51-28-04. Requirements on automatic dialing-announcing devices.

A caller may not use an automatic dialing-announcing device unless the device is designed and operated so as to disconnect within ten seconds after termination of the telephone call by the subscriber. A caller may not use an automatic dialing-announcing device that uses a random or sequential number generator unless the equipment excludes calls to the following telephone numbers:

1. Emergency telephone numbers, including 911, of any hospital, medical physician, health care facility, ambulance or emergency medical provider, fire protection facility, or law enforcement agency.

2. Any guest room or patient room of a hospital, health care facility, elderly care home, or similar establishment.

3. A paging service, a cellular telephone service, a specialized mobile radio service, or any service for which the called party is charged for the call.

4. The telephone numbers maintained on a do-not-call list established pursuant to section 51-28-09.

51-28-05. Time of day limit.

A caller may not use an automatic dialing-announcing device nor make any telephone solicitation before eight a.m. or after nine p.m. at the telephone subscriber's location.

51-28-06. Prohibited telephone solicitations.

A caller may not make or cause to be made any telephone solicitation to the telephone line of any subscriber in this state who, for at least thirty-one days before the date the call is

made, has been on the do-not-call list established and maintained or used by the attorney general under section 51-28-09 or the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 310.

51-28-07. Identification by caller.

Any caller who makes a telephone solicitation to a subscriber in this state shall immediately and clearly state at the beginning of the call the caller's true first and last name, the caller's telephone number, the caller's city and state of location, and the name of the business on whose behalf the telephone solicitation is made.

51-28-08. Interference with caller identification.

A caller who makes a telephone solicitation to a subscriber in this state may not knowingly use any method to block or otherwise deliberately circumvent the subscriber's use of a caller identification service.

51-28-09. Establishment of do-not-call list—Federal trade commission do-not-call registry.

1. The attorney general shall establish and maintain a list of telephone numbers of subscribers who object to receiving telephone solicitations. The attorney general may fulfill the requirements of this section by contracting with an agent for the establishment and maintenance of the list or by using the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 310. The attorney general may adopt rules governing the establishment, distribution, and operation of the do-not-call list, as the attorney general deems necessary and appropriate to fully implement the provisions of this chapter, in addition to the following provisions:

a. Any subscriber may contact the attorney general or the attorney general's agent and give notice, in the manner

prescribed by the attorney general, that the subscriber objects to receiving telephone solicitations. The attorney general shall add the telephone number of any subscriber who gives notice of objection to the list maintained pursuant to this section.

b. Any notice given by a subscriber under this section is effective for five years unless revoked by the subscriber. Any subsequent notices given by the same subscriber related to a different telephone number are separate from the original notice.

c. The attorney general shall allow subscribers to give notice under this section by mail, telephone, or electronically.

d. The attorney general shall establish the procedures by which a person wishing to make telephone solicitations may obtain access to the list. To the extent practicable, those procedures shall allow for access to paper or electronic copies of the list.

e. The attorney general may include in the list established under this section subscribers who live in North Dakota and are included in the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 310. The attorney general may provide to the federal trade commission the telephone numbers of North Dakota subscribers who are in the attorney general's do-not-call list or who have otherwise notified the attorney general of the subscriber's objection to receiving telephone solicitations for inclusion in the national do-not-call registry.

f. A person or entity desiring to make telephone solicitations shall pay a fee, payable to the attorney general, for access to, or for paper or electronic copies of, the list established under section 51-28-09. The fee for acquisition of the list may not exceed two hundred dollars per quarter, or eight hundred dollars per year.

2. Notwithstanding any other provision of this chapter, the attorney general may designate the national do-not-call registry established and maintained by the federal trade commission under title 16, Code of Federal Regulations, part 61, as the state do-not-call list.

51-28-10. Release of information.

Information contained in the list established under section 51-28-09 may not be used for any purposes except compliance with this chapter or in a proceeding or action under this chapter or chapter 51-15. The information contained in the list is an exempt record as defined in section 44-04-17.1.

51-28-11. Private enforcement.

Any person who receives a telephone solicitation or message in violation of this chapter may bring an action to enjoin such violation, or for damages, or both. The court may award the plaintiff the plaintiff's actual damages or damages up to two thousand dollars for each violation, whichever is greater. The court may award the plaintiff costs, expenses, and reasonable attorney's fees. This section shall not limit any other claims the person may have against the caller.

51-28-12. Limitation of actions.

No action or proceeding may be brought under this chapter:

1. More than one year after the person bringing the action knew or should have known of the alleged violation; or

2. More than one year after the termination of any proceeding or action by the attorney general, whichever is later.

51-28-13. Powers of the attorney general—Remedies—Injunction—Other relief.

When it appears to the attorney general that a person has engaged in, or is engaging in, any practice declared to be unlawful by this chapter, the attorney general, in enforcing this chapter, has all powers provided in this chapter or chapter 51-15, and may seek all remedies in this chapter or chapter 51-15.

51-28-14. Cease and desist orders.

When it appears to the attorney general that a person has engaged in, or is engaging in, any practice declared to be unlawful by this chapter or by any rule or order of the attorney general issued under this chapter, the attorney general, without notice and hearing, may issue any cease and desist order which the attorney general deems necessary or appropriate in the public interest, including if any person fails or refuses to file any statement or report, or obey any subpoena issued by the attorney general under this chapter or chapter 51-15. A person aggrieved by an order issued under this section may request a hearing before the attorney general if a written request is made within ten days after the receipt of the order. An adjudicative proceeding under this section must be conducted in accordance with chapter 28-32, unless otherwise specifically provided herein.

51-28-15. Civil penalties in an adjudicative proceeding.

When it appears to the attorney general that a person has engaged in, or is engaging in, any practice declared to be unlawful by this chapter or by any rule or order of the attorney general issued under this chapter, the attorney general may impose by order and collect a civil penalty against any person found in an adjudicative proceeding to have violated any provision of this chapter, or any rule or order adopted under this chapter, in an amount not more than

two thousand dollars for each violation of this chapter or any rule or order adopted under this chapter. The attorney general may bring an action in district court to recover penalties under this section.

51-28-16. Costs recoverable in adjudicative proceeding—Hearing costs.

If the attorney general prevails in an adjudicative proceeding pursuant to section 51-28-14 or 51-28-15, the attorney general may assess the nonprevailing person for all adjudicative proceeding and hearing costs, including reasonable attorney's fees, investigation fees, costs, and expenses of any investigation and action brought under the provisions of this chapter.

51-28-17. Civil penalties in court proceeding.

The court may award the attorney general civil penalties of not more than two thousand dollars per violation of this chapter. A violation of this chapter constitutes a violation of chapter 51-15 and the court may award civil penalties under section 51-15-11.

51-28-18. Costs recoverable in court proceeding.

The attorney general is entitled to an award of reasonable attorney's fees, investigation fees, costs, and expenses of any investigation and action brought under the provisions of this chapter.

51-28-19. Separate violations—Nonexclusive remedies and penalties.

For each remedy or penalty under this chapter or chapter 51-15, or otherwise provided by law, each telephone solicitation or message shall constitute a separate violation for purposes of an adjudicative proceeding or an action in district court. The remedies, duties, prohibitions, and penalties of this

chapter are not exclusive and are in addition to all other causes of action, remedies, and penalties in chapter 51-15, or otherwise provided by law.

51-28-20. Caller identification service nonliability.

No provider of caller identification service shall be held liable for violations of this chapter committed by other persons or entities.

51-28-21. Disposition of fees, penalties, and recoveries.

All fees, penalties, and recoveries of attorney's fees, investigation fees, costs, and expenses collected pursuant to this chapter shall be retained by the attorney general for enforcement of this chapter, including to pay costs, expenses, and attorney's fees and salaries incurred in the operation of the attorney general's consumer protection and antitrust division. However, the attorney general may deposit any excess funds not required for enforcement of this chapter in the attorney general refund fund under section 54-12-18.

51-28-22. Venue.

The attorney general or a plaintiff in a private enforcement action may bring an action pursuant to this chapter in either the county of the telephone subscriber's residence or Burleigh County.

SUPREME COURT, U.S.
FILED
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OFFICE OF THE CLERK

No. 05-1149

In the Supreme Court of the United States

FRATERNAL ORDER OF POLICE, NORTH DAKOTA STATE LODGE, and VETERANS OF FOREIGN WARS - DEPARTMENT OF NORTH DAKOTA,
Petitioners,

v.

WAYNE STENEHJEM, in his official capacity as Attorney General of the State of North Dakota,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the First Amendment permits states to enforce consumer requests not to be solicited by contract telemarketers calling on behalf of charities?

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STATEMENT OF THE CASE

A. The Telephone Solicitations Act.

Petitioners, nonprofit corporations who use paid telephone solicitors working under contract to solicit funds from North Dakota consumers, seek review of a decision of the United States Court of Appeals for the Eighth Circuit that rejected Petitioners' First Amendment challenge to North Dakota's Telephone Solicitations Act, N.D. Cent. Code ch. 51-28.

To address the growing problem of increased telemarketing calls and allow North Dakota citizens to regain privacy within their residences, in 2003 the North Dakota Legislature enacted N.D. Cent. Code ch. 51-28 (the Act). The Act permits any subscriber of residential telephone service to request the inclusion of that subscriber's residential telephone number on a do-not-call list maintained by the North Dakota Attorney General. N.D. Cent. Code § 51-28-09(1)(a), Pet. App. 31a-32a. The Act prohibits making "telephone solicitations" to registered telephone numbers. N.D. Cent. Code § 51-28-06, Pet. App. 30a-31a. The Act defines "telephone solicitation" as "any voice communication over a telephone line for the purpose of encouraging charitable contributions, or the purchase or rental of, or investment in, property, goods, services, or merchandise . . . ." N.D. Cent. Code § 51-28-01(7), Pet. App. 28a.

The Act thus protects subscribers who choose to place their residential telephone numbers on the list from a broad spectrum of telephone solicitations. The Act does not, however, prohibit all such calls. In particular, it does not proscribe telephone solicitations to registered subscribers "[b]y or on behalf of a charitable organization that is exempt

from federal income taxation under section 501 of the Internal Revenue Code" if the call is made by "a volunteer or employee of the charitable organization . . . ." N.D. Cent. Code § 51-28-01(7)(c), Pet. App. 28a.

The North Dakota Attorney General is charged with implementing and administering the Act. N.D. Cent. Code § 51-28-09, Pet. App. 31a-33a. The Act authorizes the Attorney General to seek injunctive relief and penalties against violators of the Act. N.D. Cent. Code §§ 51-28-13, 51-28-15, 51-28-17, Pet. App. 34a-35a.[1] In addition, subscribers may seek private enforcement of the Act. N.D. Cent. Code § 51-28-11, Pet. App. 33a.[2]

B. The Proceedings Below.

Petitioners filed suit in the United States District Court for the District of North Dakota seeking a judgment declaring that

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[1] Petitioners assert the Attorney General may issue a cease and desist order without notice or hearing. Pet. 7. If the Attorney General issues a cease and desist order pursuant to N.D. Cent. Code § 51-28-14, the person aggrieved by the order is entitled to a hearing. The hearing must be conducted in accordance with the North Dakota Administrative Agencies Practice Act (N.D. Cent. Code ch. 28-32). N.D. Cent. Code § 51-28-14, Pet. App. 34a. In this facial challenge, Petitioners have not asserted the Attorney General has enforced the Act in violation of anyone's due process rights, much less the rights of Petitioners.

[2] The Act also restricts the use of automatic dialing-announcing devices, the time of day telephone solicitations may be made, and the use of methods to block a subscriber's caller identification service. N.D. Cent. Code §§ 51-28-02, 51-28-03, 51-28-04, 51-28-05, 51-28-08, Pet. App. 29a-31a. Petitioners did not challenge those provisions of the Act.